No. 98-906

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

STATE OF GEORGIA, DEPARTMENT OF REVENUE,

Petitioner,

vs.

GARY BURKE and PAMELA B. BURKE and
RAYMOND D. HEADRICK and CYNTHIA J. HEADRICK,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MOTION OF BUSINESS BANKRUPTCY LAW COMMITTEE, NEW YORK COUNTY LAWYERS' ASSOCIATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER AND BRIEF *AMICUS CURIAE*

IRA R. ABEL
LEE A. ADLERSTEIN, Chairman
LEONARD H. GERSON
GARY S. JACOBSON
Business Bankruptcy Law Committee,
New York County Lawyers' Association
14 Vesey Street
New York, NY 10007-2997
(212) 267-6646

LEONARD H. GERSON
Counsel of Record
ANGEL & FRANKEL, P.C.
460 Park Avenue
New York, NY 10022-1906
(212) 752-8000

150896

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

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MOTION FOR LEAVE TO FILE BRIEF

Pursuant to Rule 37.2(b) of the Rules of this Court, *amicus*, the Business Bankruptcy Law Committee (the "Committee") of the New York County Lawyers' Association (the "Association") hereby moves for leave to file the accompanying brief. Respondent has granted,[1] but Petitioner has refused to consent to the filing of the accompanying brief in this case.

The Association is an organization of approximately 9,300 members, which was founded in 1908. The Association and its committees periodically take positions on legal issues and intervene as amicus curiae in cases which are important to the public and legal profession.

The Committee has become concerned about the effect that the Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S. Ct. 1114 (1996) has had upon the practice of bankruptcy. It has filed *amicus curiae* briefs in support of the constitutionality of section 106 of the Bankruptcy Code, 11 U.S.C. § 101 *et seq.*, in the Third, Fifth, Tenth and Eleventh Circuit Courts of Appeals and has participated in oral argument before the Tenth and Eleventh Circuits, including the present case.

The petition filed by Georgia focuses upon the conflict among the federal circuit courts of appeals with respect to the waiver of Eleventh Amendment immunity which results from the filing of a proof of claim by a state in a bankruptcy. The Committee believes that the disarray in the case law is creating confusing precedents which undermine established Eleventh Amendment doctrines outside of bankruptcy.

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1. Respondent's letter of consent has been filed with the Clerk of the Court.

While Georgia recognizes that the instant case raises issues pertaining to the constitutionality of section 106(a) and (b) of the Bankruptcy Code, the Committee believes a fuller analysis of the question of whether Congress has the power to abrogate a state's Eleventh Amendment immunity is required. For example, a conflict between the Fifth and Seventh Circuits has arisen with respect to whether a bankruptcy court has the power to discharge a debt owing to a state, if a state has not waived its Eleventh Amendment immunity.

Although Georgia provides a substantial basis for granting a writ of certiorari in this instance, the petition does not address certain critical points. These additional points, discussed more fully in the accompanying brief, provide compelling support for the granting of a writ of certiorari. Accordingly, the Committee respectfully requests that the Court grant leave to file the accompanying brief.

Respectfully submitted,

LEONARD H. GERSON
Counsel of Record
ANGEL & FRANKEL, P.C.
460 Park Avenue
New York, NY 10022-1906
(212) 752-8000

IRA R. ABEL
LEE A. ADLERSTEIN, Chairman
LEONARD H. GERSON
GARY S. JACOBSON
Business Bankruptcy Law Committee,
New York County Lawyers' Association
14 Vesey Street
New York, NY 10007-2997
(212) 267-6646

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STATEMENT OF INTEREST

The New York County Lawyers' Association (the "Association") is an organization of approximately 9,300 members, which was founded in 1908. The Association and its committees periodically take positions on legal issues and intervene as amicus curiae in cases which are important to the public and legal profession.

The Business Bankruptcy Law Committee of the Association (the "Committee") has become concerned about the effect that the Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S. Ct. 1114 (1996) has had upon the practice of bankruptcy. It has filed *amicus curiae* briefs in support of the constitutionality of section 106 of the Bankruptcy Code, 11 U.S.C. § 101 *et seq.*, in the Third, Fifth, Tenth and Eleventh Circuit Courts of Appeals and has participated in oral argument before the Tenth and Eleventh Circuits, including the present case.

In order to avoid major problems in the practice of bankruptcy, the Committee believes that the constitutionality of section 106 of the Bankruptcy Code and related Eleventh Amendment issues need to be addressed by this Court. This brief is submitted in support of the petition for a writ of certiorari filed by the State of Georgia, Department of Revenue ("Georgia").[1]

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1. Counsel for a party did not author the brief in whole or in part, and no person or entity other than the Committee, its members or its counsel, have made a monetary contribution to the preparation or submission of this brief. While the Committee's position on the merits of this case may benefit the Respondent, the Committee has no stake in the recovery that any party may receive in connection with the case.

SUMMARY OF ARGUMENT

Georgia is asking this Court to resolve a conflict among the federal circuit courts of appeals with respect to the extent to which a state's sovereign immunity is waived by the filing of a proof of claim in bankruptcy. Congress has defined this waiver in section 106(b) of the Bankruptcy Code.

Congress traditionally has undertaken the delicate task of balancing the competing interests represented by a state's sovereign immunity and the need to administer all of a debtor's assets and liabilities in a centralized proceeding. This Court's opinion in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S. Ct. 1114 (1996) has undermined the authority of Congress in this area, and the Court's decades old decisions involving the adjudication of a state's claim in bankruptcy fail to provide a clear guide. The resulting dangers are reflected not only in the differences among the federal circuit courts of appeals, but also in opinions by courts on all levels, which often reconcile the inherent conflict between Eleventh Amendment immunity and the collective nature of a bankruptcy with rulings which undermine established Eleventh Amendment doctrines.

In addition to considering the constitutionality of the waiver of state sovereign immunity provided in section 106(b) of the Bankruptcy Code, also fully briefed and argued before the Eleventh Circuit was the issue of Congress's power to abrogate a state's Eleventh Amendment immunity in section 106(a). These two issues are inextricably linked, because if Congress has the power to abrogate Eleventh Amendment immunity, less reliance upon the doctrine of waiver is required in order to preserve the orderly operation of the bankruptcy system.

The collective nature of a bankruptcy distinguishes the issues in the decision below from other Eleventh Amendment controversies. By examining the issue of waiver in the instant case the Court can answer the essential question of what Eleventh Amendment rights are relinquished by a state when a proof of claim is filed. In addressing this question, the Court can determine whether waiver is even a factor, or whether Congress has the power to abrogate a state's Eleventh Amendment immunity in matters involving a violation of the Bankruptcy Code's automatic stay or discharge injunction.

REASONS FOR GRANTING THE WRIT

I.

AFTER *SEMINOLE TRIBE* NO CLEAR UNDERSTANDING EXISTS ON THE EXTENT TO WHICH STATES ARE SUBJECT TO BANKRUPTCY COURT JURISDICTION

In 1996 this Court ruled in *Seminole Tribe* that Congress lacked the power under the Commerce Clause in Article I of the Constitution to abrogate a state's Eleventh Amendment immunity. In a footnote, the *Seminole Tribe* Court stated that this same principle was applicable in bankruptcy, but provided no detailed discussion of the issue. *Seminole Tribe*, 116 S. Ct. at 1131 n.16. Thus, a void was created, which the lower courts have been unable to fill.

States are among the most significant parties in bankruptcy. *See* "State Bankruptcy Survey Results," 29 *Bankruptcy Court Decisions* 21 at 1 (November 19, 1996). However, following this Court's decision in *Seminole Tribe*, lower courts routinely have ruled that the Eleventh Amendment bars a bankruptcy court from asserting jurisdiction over a state in the absence of a state's filing of a proof of claim. *See, e.g., In re Mitchell*, 222

B.R. 877 (BAP 9th Cir. 1998) (bankruptcy court lacks jurisdiction to determine dischargeability of state income tax debt); *In re Christie*, 222 B.R. 64 (Bankr. D N.J. 1998) (bankruptcy court must vacate prior order voiding state's lien on debtor's exempt property, as no proof of claim filed); *In re Tri-City Turf Club, Inc.*, 203 B.R. 617 (Bankr. E.D. Ky. 1996) (bankruptcy court lacks jurisdiction over action to enjoin state agency from revoking debtor's license in violation of automatic stay). The filing of a proof of claim has become a prerequisite for establishing a bankruptcy court's jurisdiction over a state.

The waiver of Eleventh Amendment immunity triggered by the filing of a proof of claim was recognized by this Court more than half a century ago in *Gardner v. New Jersey*, 329 U.S. 565 (1947). The opinion in *Gardner*, however, does not clearly delineate the extent of that waiver. Prior to this Court's opinion in *Seminole Tribe*, Congress shouldered that burden. Now, as described in the Petition, major conflicts have arisen among the federal circuit courts of appeals regarding the consequences which arise from the filing of a proof of claim by a state in bankruptcy.

Central to these differing interpretations are the underlying constitutional questions of the extent to which the filing of a proof of claim constitutes a waiver of Eleventh Amendment immunity and the ability of Congress to define the extent of that waiver. As described by Georgia, the Tenth Circuit in *In re Straight*, 143 F.3d 1387 (10th Cir.), *cert. denied*, 119 S. Ct. 446 (1998) upheld the constitutionality of Congress's definition of the degree of waiver provided in section 106(b) of the Bankruptcy Code. Pet. 10. In contrast, the Fourth Circuit in *In re Creative Goldsmiths of Washington, DC Inc.*, 119 F.3d 1140 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 1517 (1998) found that under the rule established by this Court in *Seminole Tribe*, Congress's attempt to define waiver in section 106(b) constituted an unconstitutional attempt to abrogate Eleventh Amendment immunity.

The Fourth Circuit, nevertheless, did not deny that some form of waiver was created by the filing of a proof of claim. Instead, it ruled that the filing of a proof of claim subjects a state to suit for a compulsory counterclaim arising from the same transaction which is the subject of a state's proof of claim. However, absent from the *Creative Goldsmiths* opinion is any real justification for why the assertion of a compulsory counterclaim against a state does not violate the Eleventh Amendment. The *Creative Goldsmiths* court simply reasoned that:

> [I]t would violate the fundamental fairness of judicial process to allow a state to proceed in federal court and at the same time strip the defendant of valid defenses because they might be construed to be affirmative claims against the state.

Id. at 1148. Nowhere in the opinion does the Fourth Circuit explain how a bankruptcy court's equitable powers may supersede the dictates of the Eleventh Amendment.

The Eleventh Circuit in the opinion below adopted an alternative strategy in analyzing the consequences of the filing of a proof of claim by a state in bankruptcy. The court below declined to rely upon the definition of waiver in section 106(b) given this Court's opinion in *Seminole Tribe*, Pet. App. 9 n.8; nor was it willing to accept the compulsory counterclaim rule as a measure for defining a waiver of Eleventh Amendment immunity. *Id.* at 16 n.13. Instead, the Eleventh Circuit ruled that where a debtor's claims against a state involve the same taxes as are the subject of a state's proof of claim, and where the recovery sought is limited to costs and attorneys' fees, a bankruptcy court's resolution of the claim falls "easily within the waiver of immunity" established in *Gardner*. *Id.* at 15. However, the court below failed to provide any definition of the extent of that waiver.

Underlying the opinions in *Straight*, *Creative Goldsmiths* and the decision below is the understanding that under the rule set forth by this Court in *Gardner*, when a state files a proof of claim, it subjects itself to the jurisdiction of a bankruptcy court. Prior to this Court's opinion in *Seminole Tribe*, the universally accepted limits of that jurisdiction were defined by Congress in the Bankruptcy Code.[2] However, as *Seminole Tribe* has undermined the authority of Congress to define those limits, the federal circuit courts of appeals now require the guidance of this Court in defining this very delicate balance in state and federal power.

II.

THIS COURT'S REVIEW IS REQUIRED TO ELIMINATE THE CONFUSING AND MISLEADING ELEVENTH AMENDMENT PRECEDENTS BEING CREATED IN BANKRUPTCY IN THE POST *SEMINOLE TRIBE* ERA

Following the opinion in *Seminole Tribe*, numerous courts have recognized the basic conflict between *Seminole Tribe's* broad application of the Eleventh Amendment and "the policy imperatives of federal bankruptcy law." *In re C.J. Rogers, Inc.*, 212 B.R. 265, 276, n. 5 (Bankr. E.D. Mich. 1997). Some courts have asserted continued bankruptcy court jurisdiction over a state in ways which violate basic Eleventh Amendment doctrines.

For example, in *Texas v. Walker*, 142 F.3d 813 (5th Cir. 1998), *cert. denied, sub. nom, Walker v. Texas*, 1999 U.S. Lexis

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2. The two earlier cases discussed in the Petition - *Jones v. Yorke*, 710 F.2d 1297 (7th Cir. 1983) and *Ohio v. Madeline Nursing Homes*, 694 F.2d 449 (6th Cir. 1982), *see* Pet. 7-9, were cases under the Bankruptcy Act, which contained no provision addressing the sovereign immunity of a state.

573 (U.S. Jan. 19, 1999) the Fifth Circuit Court of Appeals ruled that the discharge of a debt to a state did not violate the Eleventh Amendment, because it is a state's choice whether to participate in a bankruptcy, while a bankruptcy court possesses the authority to issue an order discharging a debt "by virtue of the Supremacy Clause." *Id.* at 822. The fallacy in that reasoning is that the constitutionality of any act of Congress could withstand an Eleventh Amendment challenge, if the Supremacy Clause were an adequate shield against such an attack.[3]

Similar problems have arisen in bankruptcy from an overly broad application of the *Ex parte Young* exception to Eleventh Amendment immunity. For example, in *In re Guiding Light Corp.*, 213 B.R. 489 (Bankr. E.D. La. 1997) the bankruptcy court refused to dismiss a suit brought against the head of the Louisiana Department of Health and Hospitals for wrongfully withholding post-petition payments owing to a debtor. The *Guiding Light* court refused to dismiss the suit, because one of

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3. This is not to suggest that Supremacy Clause issues are not implicated in Eleventh Amendment controversies arising in bankruptcy. For example, in one of this Court's seminal Supremacy Clause opinions, *Perez v. Campbell*, 402 U.S. 637 (1971), it was determined that a state could not condition the restoration of an uninsured debtor's driver's license upon his payment of a judgment arising from an auto accident. Although the *Perez* Court recognized that a state had a legitimate police power interest in maintaining highway safety, it ruled that the Supremacy Clause barred a state from not giving full effect to a debtor's discharge in bankruptcy. In contrast, *Seminole Tribe* was interpreted in *In re Perez*, 220 B.R. 216 (Bankr. D. N.J. 1998) to mean that a bankruptcy court lacks the power to order the restoration of a debtor's driver's license (and even to prevent the debtor's incarceration by a municipal judge), because of a failure to pay pre-petition parking tickets, notwithstanding the fact that those debts were being paid under a confirmed chapter 13 plan. This recent *Perez* opinion demonstrates the confusion and threat to comity arising in recent Eleventh Amendment controversies in bankruptcy.

the counts was framed as a request for an order prohibiting the department head from exercising continued control over previously withheld funds. *Id.* at 492. Such a ruling obviously goes beyond the *Ex parte Young* exception allowing for prospective relief, as the suit remained an action seeking direct payment from the state treasury. *See, e.g., Edelman v. Jordan*, 415 U.S. 651, 664-671 (1974).

This Court has ruled that actions for any form of relief against a state fall within the purview of the Eleventh Amendment. *See Missouri v. Fiske*, 290 U.S. 18, 28 (1933). Yet, in *In re Barrett Refining Corp.*, 221 B.R. 795, 807-808 (Bankr. W.D. Okla. 1998), the bankruptcy court ruled that the Eleventh Amendment was inapplicable in bankruptcy. The *Barrett* court concluded that bankruptcy cases were not suits within the meaning of the Eleventh Amendment, as no affirmative recovery was being sought by a debtor against a state. *Id.* at 807-808. Similarly, in *In re Psychiatric Hosps. of Florida, Inc.*, 216 B.R. 660 (M.D. Fla. 1998), the district court ruled that a motion by a debtor to determine its tax liability to a state was not a suit within the meaning of the Eleventh Amendment.

The clash between the Eleventh Amendment and the operation of the bankruptcy system is clearly illustrated by the decisions in the NVR Homes bankruptcy. In *In re NVR L.P.*, 206 B.R. 831 (Bankr. E.D. Va. 1997) the issue was whether the transfer tax exemption provided by section 1146(c) of the Bankruptcy Code was applicable to various transfers of property made by chapter 11 debtors pursuant to their jointly consolidated plan of reorganization. The *NVR* court ruled that *Seminole Tribe* barred it from even issuing a declaratory judgment with respect to whether the Bankruptcy Code exemption applied. It further warned of the dire consequences that the application of the *Seminole Tribe* doctrine would have in bankruptcy. The *NVR* court observed:

> [A] potentially irreconcilable conflict . . . may now exist between the Bankruptcy Clause and the Eleventh Amendment. Our national bankruptcy system, in which Congress intends debtors to retain the opportunity to reorganize and to obtain a fresh start, may be in grave danger if the states cannot be bound by orders issued by the federal courts under bankruptcy law.

Id. at 843 n. 25. On appeal, the district court found a way to remedy this threat to the operation of the bankruptcy law. In *Clerk of Circuit Court v. NVR Homes, Inc.*, 222 B.R. 514, 520-521 (E.D. Va. 1998), the district court ruled that an action by a debtor seeking a declaration of whether a section 1146(c) tax exemption applied was not the type of suit which fell within the scope of the Eleventh Amendment. Obviously, no declaratory judgment exception to the Eleventh Amendment exists. Such tortured results reflect the type of precedent being created by courts on all levels to protect the operation of the bankruptcy system.

After struggling with the inherent conflicts between the collective nature of a bankruptcy and the ability of a state to frustrate that process by the assertion of its enhanced Eleventh Amendment immunity, one bankruptcy judge concluded:

> Those who have devoted their professional lives and skills to federal law (and those whose jobs depend on the reorganizations and other activities, that the process contemplates) are anxious for instruction about what is Constitutionally permissible.

In re Zywiczynski, 210 B.R. 924, 933-934 (Bankr. W.D. N.Y. 1997). Almost three years have passed since this Court described in dicta that Congress lacks the power to abrogate a state's Eleventh Amendment immunity in bankruptcy; yet, the lower courts still lack the necessary guidance in understanding

the constitutional limits on a state's participation in the bankruptcy process. This uncertainly is breeding a confused set of precedents, which threaten to cloud the application of Eleventh Amendment doctrines in other areas of the law.

III.

THIS COURT SHOULD DECIDE WHETHER THE ELEVENTH AMENDMENT BARS CONGRESS FROM ABROGATING A STATE'S SOVEREIGN IMMUNITY PURSUANT TO ITS POWERS UNDER THE BANKRUPTCY CLAUSE OR THE FOURTEENTH AMENDMENT

Underlying the confusing Eleventh Amendment precedents arising in bankruptcy is the inability of a collective process to operate properly, where a critical participant, a state, can exclude itself by asserting its Eleventh Amendment immunity.

The issue of whether Congress has the power to abrogate a state's Eleventh Amendment immunity was decided by the bankruptcy court and district court below, and was fully briefed and argued before the Eleventh Circuit.[4] Thus, ripe for decision is the question of whether Congress has the right to abrogate a state's Eleventh Amendment immunity. *See United States v. Williams*, 504 U.S. 36, 41 (1992); *see also Carlson v. Federal Bureau of Prisons*, 446 U.S. 14, 17 n.2 (1980) (Court may decide questions not raised below in the interest of judicial administration).

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4. The bankruptcy and district courts ruled that the abrogation of sovereign immunity in section 106 of the Bankruptcy Code reflected an exercise of Congress's power under the Fourteenth Amendment, the position advocated by the Respondent. The Committee argued before the Eleventh Circuit that the power to abrogate a state's sovereign immunity was inherent in the Bankruptcy Clause. U.S. Const., art. I, § 8, cl. 4.

Georgia is seeking a reversal of the lower court's order for costs and attorney's fees arising from the state's violation of a bankruptcy court's order discharging a debt and the automatic stay, an injunction arising upon the filing of a petition in bankruptcy. The automatic stay is recognized as a fundamental protection provided by the Bankruptcy Code. 11 U.S.C. § 362(a). *See Midlantic Nat'l Bank v. New Jersey Dep't Envntl. Protection*, 474 U.S. 494, 503 (1986). It furthers the basic bankruptcy policy of providing an equal distribution of a debtor's assets among its creditors by enjoining all entities from taking any action against a debtor to collect a pre-petition debt. *In re Parr Meadows Racing Assoc.*, 880 F.2d 1540, 1545 (2d Cir. 1989), *cert. denied, sub nom., Suffolk County Treasurer v. Barr*, 493 U.S. 1058 (1990). Thus, when a state's sovereign immunity is successfully asserted to bar enforcement of the automatic stay, more than the rights of a single debtor are affected. The rights of all of a debtor's creditors are altered.

In considering the issues raised by the decision below, this Court also will be able to resolve an Eleventh Amendment conflict between federal circuit courts of appeals with respect to a bankruptcy court's ability to discharge a debt owing to a state. As previously discussed, in *Texas v. Walker*, the Fifth Circuit ruled that the power of a bankruptcy court to discharge a debt was not dependent upon a state's filing of a proof of claim. *Walker*, 142 F.3d at 822-823. In contrast, in *In re Platter*, 140 F.3d 676 (7th Cir. 1998) the Seventh Circuit reasoned that a bankruptcy court's authority to discharge a debt was contingent upon a state's filing of a proof of claim or an equivalent action. Thus, in matters involving a state, there is a conflict in the federal circuit courts of appeals with respect to whether a bankruptcy court has the power to exercise one of its primary functions — the discharge of a debt.

Prior to this Court's opinion in *Seminole Tribe*, such basic constitutional questions involving the Eleventh Amendment and bankruptcy did not require a precise definition. For example, this Court ruled in *New York v. Irving Trust Co.*, 288 U.S. 329 (1933) that sovereign immunity did not bar a state from being subject to a bankruptcy court's order limiting the time within which a claim against a debtor could be filed. However, the *Irving Trust* Court relied simply upon the need for the "orderly" operation of the bankruptcy process. *Id.* at 333; no attempt was made to describe how a state could be subjected to a bankruptcy court's order absent the filing of a proof of claim. This Court's opinion in *Seminole Tribe* now imposes a much more exacting Eleventh Amendment test upon challenges to a state's sovereign immunity in bankruptcy, a test for which the Court's prior opinions fail to provide clear parameters.

Since its opinion in *Seminole Tribe*, this Court has shown a willingness to consider Eleventh Amendment questions comparable to the issues presented in the instant case. For example, in its recent decision in *Wisconsin Dept. of Corrections v. Schacht*, __ U.S. __, 118 S. Ct. 2047 (1998), this Court refused to accept a previously recognized broad application of Eleventh Amendment immunity requiring the dismissal of a case removed by a state to federal court after the claims against the state are dismissed on Eleventh Amendment grounds, notwithstanding the existence of nonbarred claims for relief against individual defendants. Justice Kennedy stated in his concurring opinion in *Schacht* that the Court should consider in some later case whether a state waived its Eleventh Amendment immunity by choosing to remove a case to federal court. *Id.* at 2055-2057. He recognized that such an action by a state was akin to the filing of a proof of claim in bankruptcy. *Id.* at 2056.

Even more significant was this Court's recognition of an in rem exception to Eleventh Amendment immunity in admiralty cases in *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 118 S. Ct. 1464 (1998). Under the former Bankruptcy Act, a bankruptcy court's jurisdiction over the property of a debtor was used to define the court's jurisdiction to decide a controversy.

Several federal circuit courts of appeals appear to have implicitly recognized an in rem exception to Eleventh Amendment immunity in bankruptcy. For example, in *Maryland v. Antonelli Creditors' Liquidating Trust*, 123 F.3d 777 (4th Cir. 1997), the Fourth Circuit found that a state was bound by the transfer tax exemption provided in an order confirming a chapter 11 plan. The *Antonelli* court responded to an Eleventh Amendment challenge by claiming that the power to issue a confirmation order was derived from the bankruptcy court's jurisdiction over the debtor and its estate, "not from jurisdiction over the state." *Id.* at 787. The distinctive position a bankruptcy court holds because of its jurisdiction over the property of a debtor also was recognized by the Fifth Circuit Court of Appeals in *Walker*, 142 F.3d at 822.

Neither of these circuit courts of appeals would explicitly recognize the existence of an in rem exception to Eleventh Amendment immunity in bankruptcy, given this Court's broad statement of principle in *Seminole Tribe*, and its prior rulings in *United States v. Nordic Village Inc.*, 503 U.S. 30, 39 (1992) (no in rem exception exists to sovereign immunity bar against monetary recovery) and *Fiske*, 290 U.S. at 28 (no in rem exception to Eleventh Amendment immunity exists). Thus, by addressing the Eleventh Amendment abrogation issue in the instant case, this Court can provide direction to the lower courts in matters involving the automatic stay, the discharging of a debtor's liabilities, and other orders whose collective nature is

the particular province of bankruptcy. It is apparent that some type of abrogation of sovereign immunity is required; otherwise, as reflected in the Seventh Circuit's opinion in *Platter*, essential bankruptcy court orders would be ineffective against a state which had not waived its Eleventh Amendment immunity.

In *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 117 S. Ct. 2028 (1997), this Court recognized that the resolution of Eleventh Amendment controversies may involve a balancing of interests. *Id.* at 2038. Such an approach is consistent with this Court's past recognition of "the delicate adjustments required by our federalism." *Toucey v. New York Life Insurance Co.*, 314 U.S. 118, 141 (1941). A conflict already has arisen between the Fifth and Seventh Circuits with respect to whether the Eleventh Amendment bars a bankruptcy court from discharging a debt owed to a state. After *Seminole Tribe*, only this Court has the authority to give direction to the lower courts in striking the delicate balance which must be established in resolving the inherent conflict between a state's Eleventh Amendment rights and the federal bankruptcy power.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

LEONARD H. GERSON
Counsel of Record
ANGEL & FRANKEL, P.C.
460 Park Avenue
New York, NY 10022-1906
(212) 752-8000

IRA R. ABEL
LEE A. ADLERSTEIN, Chairman
LEONARD H. GERSON
GARY S. JACOBSON
Business Bankruptcy Law Committee,
New York County Lawyers' Association
14 Vesey Street
New York, NY 10007-2997
(212) 267-6646